PD-0878-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/18/2018 11:36 AM
Accepted 4/18/2018 11:43 AM
DEANA WILLIAMSON
CLERK

CAUSE NO: PD-0878-17

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/18/2018
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS
Appellant
v.
JUAN MARTINEZ, JR.
Appellee

Appeal from the 156th District Court,
Bee County, Texas
Trial Court Cause No. B-14-2123-0-CR-B

13th DISTRICT COURT OF APPEALS NUMBER
13-15-00592-CR

BRIEF FOR THE APPELLEE

Patrick Overman
SBN 24095425
poverman@trla.org
Julie Balovich
SBN 24036182
jbalovich@trla.org
Bee County Regional Public Defender
331A North Washington Street
Beeville, Texas 78102
Tel: (361) 358-1925
Fax: (361) 358-5158

ATTORNEYS FOR APPELLEE
JUAN MARTINEZ, JR.

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REPLY TO THE STATE'S SOLE POINT FOR REVIEW

Where Appellee unequivocally refused to have his blood tested at the hospital and the hospital could not release his blood samples to law enforcement without a court order, the court of appeals correctly held that Appellee had a subjective and reasonable expectation of privacy in his blood samples.

Although not considered by the court of appeals, the record supplies an alternate ground for affirming the trial court judgment: law enforcement used a defective grand jury subpoena to seize his blood from the hospital.

STATEMENT OF FACTS

The facts are not in dispute. On February 5, 2014, Appellee Juan Martinez was involved in a vehicular collision in Beeville. RR 27. An ambulance transported him to Christus Spohn Hospital. RR 9. Hospital staff expedited Appellee's treatment because he met the criteria for the hospital's trauma alert protocol, which included drawing blood for medical purposes. RR 10.The hospital never tested Appellee's blood. After his blood was taken, Appellee declined further treatment. RR 69. He told the staff not to test his blood, refused to provide a urine sample, removed his I.V. which was being used to draw blood, and walked out of the hospital. RV 69-72.

DPS Trooper John Richard Quiroga went to the hospital to ask Appellee for consent for a blood draw. RR 27-28. At that point, he did not have reason to believe alcohol was a factor in the car accident. RR 27-28. Appellee had already left, so Quiroga directed the hospital to preserve Appellee's blood sample. RR 28-29. With the blood secure at the hospital, Quiroga had time to obtain a warrant to search his blood if he had grounds to do so. RR 29-30.

Quiroga did not seek a warrant. RR 29. Instead, Sergeant Daniel J. Keese obtained two documents from the District Attorney's office that purported to be grand jury subpoenas. RR 37. The documents lacked a signature from a judge or clerk of the court and a date of issuance. RR 40, 64; Defense Exh. 2. They were issued without any application being submitted. RR 33-34, 41, 56-57, 64. According to the assistant district attorney who signed the document, it is a common practice for law enforcement and prosecutors to obtain grand jury subpoenas as a means to gather evidence in an investigation. RR 59, 63. The prosecutor who signed the subpoena had no knowledge of the investigation for which the grand jury subpoena was obtained. RR 58. At the suppression hearing, the State conceded that these documents were not subpoenas, suggesting instead they were "summons" issued under article 20.10. RR 100, 102.

The documents ordered the person served to provide the blood sample to the Bee County District Attorney or to Sergeant Keese. *See* Defense Exh. 2. Sergeant

Keese delivered these documents to the hospital. RR 41. Presented with what appeared to be a court order, the hospital provided Keese with four vials of Appellee's unanalyzed blood samples. RR 42-43. Hospital staff would not have released the samples without a court order. RR 73, 83. Keese took two of the samples to the post office and mailed them to the lab to be analyzed. RR 47-48. After analyzing the sample, the lab sent a report containing its findings to Trooper Quiroga and the district attorney's office. RR 89.

Appellee was indicted on a charge of intoxication manslaughter. CR 4. Appellee moved to suppress the blood evidence on the basis that it was illegally seized and searched in violation of the U.S. and Texas Constitutions, the Code of Criminal Procedure, and the Transportation Code. CR 5-6. Following an evidentiary hearing, the trial court granted the motion to suppress and entered written findings of fact and conclusions of law:

> 1. The Court finds the seizure of the Defendant's blood from the Hospital and subsequent search of that blood by the DPS lab constitute a search and seizure within the scope of the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution.
>
> 2. The initial seizure of Juan Martinez's blood from the Hospital by the State using a Grand Jury Subpoena was a valid seizure. However,
>
> 3. The search of the blood was performed without the necessary search warrant. The blood had been drawn and was no longer subject to mutation or metabolization. Further, the blood was in the possession of the DPS and not subject to destruction. There were no

> exigent circumstances to justify a search of the blood without a warrant.
>
> 4. The search of the blood, and the subsequent blood test results, are found to be inadmissible at this time.

CR 10.

Before the court of appeals, the State asserted that this Court's precedent in *State v. Hardy* and *State v. Huse* compelled reversal. The court of appeals discussed the facts and holdings of *Hardy* and *Huse* and concluded that these cases were inapposite. *State v. Martinez*, 534 S.W.3d 97, 101 (Tex. App—Corpus Christi-Edinburg, 2017). Comparing the facts to those present before this Court in *State v. Comeaux* and finding the reasoning of the plurality opinion to be persuasive, the court of appeals held that the acquisition of Appellee's blood sample and subsequent testing by law enforcement were searches that implicated the Fourth Amendment. *Id*. at 102. Because it was undisputed that the State did not prove an exception to the warrant requirement when it conducted the blood analysis, the court did not consider the question of whether the State's seizure using a defective grand jury subpoena was valid. *Id*.

STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion to suppress under a bifurcated standard of review. With regards to the trial judge's determination of historical facts, almost total deference is applied. The application of the law to the

facts is reviewed *de novo*. The trial court judge is the sole trier of fact in a motion to suppress. The trial court's ruling must be affirmed if the record supports the ruling using any applicable theory of law. *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016).

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that Appellee had a subjective and reasonable expectation of privacy in his blood sample. At the point that Appellee's blood was drawn, it was solely due to hospital emergency protocol. Appellee refused testing of his blood and left the hospital. The record is clear he had a reasonable expectation his blood would not be turned over to law enforcement; multiple hospital personnel testified it was against policy for them to release blood samples without a court order. Because no exception to the warrant requirement existed, the blood test analysis by law enforcement was an unreasonable search that violated the Fourth Amendment.

The court of appeals did not need to pass on Appellee's argument that the grand jury subpoena was invalid, but could have affirmed on that ground as well. In *State v. Huse*, this Court held that a grand jury subpoena may be invalid if it does not comply on its face with the statutory requirements in the Code of Criminal Procedure, or if the defendant rebuts the presumption of regularity that is afforded to grand jury proceedings. The record shows that the grand jury subpoena

did not comply with the Code of Criminal Procedure, was used as an end run around the warrant requirement, and did not satisfy any legitimate grand jury purpose.

ARGUMENT

1. The court of appeals correctly held that Appellee had a subjective and reasonable expectation of privacy in his blood sample that had been drawn, but not tested, by the hospital.

Disregarding the factual record, the State asks this Court to hold as a matter of law that an individual has no reasonable expectation of privacy in blood samples taken, but not tested, by a hospital. The State would have this Court ignore a fundamental tenet of Fourth Amendment jurisprudence: that the determination of whether an individual has a reasonable expectation of privacy is a fact-specific inquiry. *Kothke v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004) ("The Supreme Court states that Fourth Amendment 'reasonableness' is measured 'in objective terms by examining the totality of the circumstances'; it 'eschew[s] bright-line rules, instead emphasizing the fact-specific nature of the . . . inquiry.'") (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

In *Love v. State*, this Court explained how a court analyzes an individual's standing to complain of a Fourth Amendment violation of his privacy rights:

> Whether a person's Fourth Amendment rights have been compromised depends . . . on the answer to "two discrete questions." First, has the person, by his conduct, exhibited an actual (subjective) expectation of privacy—did he seek to preserve something as private? And secondly,

> if so, is that subjective expectation one that society is prepared to recognize as reasonable or justifiable under the circumstances?

—— S.W.3d at ——, 2016 WL 7131259, at *3 (citing *Smith v. Maryland*, 442 U.S.735, 743-45 (1979). The record in this case answers both questions in the affirmative.

First, the record demonstrates that after his blood was drawn for medical purposes, Appellee refused to have them tested. The State contends without record support that Appellee "abandoned" his blood sample at the hospital. State's Br. at 12. The word "abandon" means a giving up, a total desertion, an absolute relinquishment. *Worsham v. State*, 56 Tex. Crim. 253, 260 (1909); *Ingram v. State*, 261 S.W.3d 749, 753 (Tex. App.—Tyler 2008, no pet.) It is not abandonment to allow the hospital keep your blood when it has been drawn; this Court can acknowledge as a matter of human experience that medical staff do not offer a patient the opportunity to keep his bodily fluids after they have been submitted for testing for medical purposes. Abandonment might have occurred if Appellee signed a release relinquishing the hospital's obligation to keep his blood samples private, or otherwise indicated such a relinquishment. But he did not, and so the contents of his blood remained private subject to the hospital's privacy policies and federal and state law.

Moreover, the record shows affirmative acts by Appellee to keep those contents private and to control what happened with his blood samples. He refused

to allow the hospital to test his blood after it had been drawn. And he refused further treatment: he walked out the front door of the hospital, removing an I.V. that was drawing blood. If, as the State alleges, Appellee had abandoned his blood samples, then the hospital would have been free to hand the samples over to law enforcement. Yet, the treating nurse, the hospital's compliance officer, and the lab manager all confirmed that they would and could not release Appellee's blood sample to anyone without a court order. RR 21, 73, 83. Tellingly, Trooper Quiroga made no effort to demand the blood sample without producing a court order or a subpoena. The State knows the hospital would require Appellee's consent or something official from a court. As the district attorney who signed the subpoena stated: "Most hospitals require some type of subpoena and judicial order before they will release any records to anybody. RR 63. These record facts support the trial court's finding that Appellee had a subjective expectation of privacy in his blood samples. No evidence contradicts this finding.

The second question is whether society would recognize Appellee's expectation of privacy under these circumstances to be reasonable. This is more in the nature of a legal question, than a factual one. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment . . . ." *Rakas v. Illinois*, 439 U.S. 128, 143 n. 12 (1978) (cited by *State v. Granville*, 423 S.W.3d 399, 407 (Tex. Crim. 2014). In *State v. Comeaux*, this Court, in a plurality opinion,

referred to the reasonableness of a patient's expectation of privacy in his blood sample as a matter of common sense:

> Common sense dictates, in this age of blood testing for everything from HIV infection to drug use, that a person does not assume that, by giving a sample of blood for private testing, that blood sample could then be submitted to the State, or to any other person or entity, for a purpose other than that for which it was given.

818 S.W.2d 46, 52 (Tex. Crim. App. 1991) (en banc). Although this reasoning in *Comeaux* did not obtain a majority, it has not been discredited or overruled by this Court. In *State v. Hardy*, this Court determined that *Comeaux* had been overruled on other grounds (due the repeal of the Texas Medical Practices Act), but still had persuasive value. 963 S.W.2d 516, 523-24 (Tex. Crim. App. 1998). Just two years ago, the U.S. Supreme Court invoked the same reasoning for why analysis of a blood sample implicates significant privacy interests:

> [A] blood test . . . places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC [blood alcohol content] reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

Birchfield v. North Dakota, 136 S. Ct. 2160, 2178 (2016). Indeed, the existence of federal and state privacy laws that expressly govern the disclosure and transmission of protected health information confirm that society widely views such information as private, and therefore the expectation of privacy as reasonable. *See* 45 C.F.R. Part 160, 164 (modified in 2002) (codifying the Privacy Rule of the

Health Insurance Portability and Accountability Act of 1996); Tex. Health & Safety Code ch. 181 (Texas Medical Records Privacy Act). These laws are not obscure: three hospital staff and the district attorney who testified in this case acknowledged a clear understanding that a patient's blood could not be released to anyone other than other medical staff without a patient's consent or a court order or subpoena.

The State implies that this Court's opinions in *State v. Hardy* and *State v. Huse* would compel a different result, but does not explain how they would. As the court of appeals correctly noted, neither case comments on the expectation of privacy that an individual has on an untested blood sample that is in hospital custody. In *Hardy*, the defendant was in a vehicular crash in which he was suspected of being intoxicated. 963, S.W.2d, 516, 517-518 (Tex. Crim. 1997) (en banc). At a hospital, blood was drawn from the defendant and analyzed it for alcohol content for medical purposes. *Id*. at 518. An officer obtained a grand jury subpoena for drug or alcohol information in the defendant's medical records. *Id*. Defendant moved to suppress the blood test results on the grounds that they were obtained in violation of the Texas Medical Practices Act and his reasonable expectation of privacy. *Id.* In its analysis of the defendant's motion to suppress, this Court split one's expectations of privacy with regards to blood alcohol test results into three parts: "(1) the physical intrusion into his body to draw blood, (2)

the exercise of control over and the testing of the blood sample, and (3) obtaining the results of the test." *Id*. at 526. This Court held that when the State's participation was limited to only part three of that analysis, the acquisition of medical records from a third party showing the result of a blood-alcohol analysis of a suspect whom the State suspects of drinking and driving does not constitute a discrete governmental search to which Fourth Amendment protections extend. *Id*. at 527. This Court was careful to limit its determination to the facts of the case – an accident where intoxication was suspected, a narrowly tailored subpoena seeking blood alcohol information, no involvement by the State in the extraction or testing of the blood sample *Id*. at 526-67.

Under *State v. Huse*, the same issue was presented but analyzed after the enactment of the Health Insurance Portability and Accountability Act of 1996 and its Privacy Rule ("HIPAA"). 491 S.W.3d 833 (Tex. Crim. App. 2016). This Court confirmed that two searches occur in a blood alcohol analysis: "when the State itself extracts blood from a DWI suspect, and when it is the State that conducts the subsequent blood alcohol analysis." *Huse*, 491 S.W.3d at 840. Ultimately, the Court held that HIPAA bolstered the reasoning in *Hardy* because the statute expressly authorizes disclosure of protected health information in response to a grand jury subpoena. *Id*. at 843. When a subpoena is directed solely at blood alcohol and drug test results, it is justified as being a "very narrow investigatory

method designed to elicit evidence for a very narrow purpose." *Id*. at 841. (citing *Hardy*, 963 S.W.2d at 526). So even if law enforcement in this case had complied with HIPAA in Appellee's case, a fact that Appellee disputes, *Huse* is distinguishable. The holding in *Huse* is limited not simply to medical records, but to "that subset of privately generated and maintained medical records that would show the result of a blood alcohol analysis in an individual that the State suspects of driving while intoxicated." 491 S.W.3d at 841. Here, the State did not seize medical records that already contained these blood alcohol results, but rather the blood itself to perform its own analysis.

To cap: the contents of Appellee's blood sample were still private when he left the hospital. The hospital could not release the sample to law enforcement without his permission, or a court order. There was no "frustration of the original expectation of privacy" and therefore, the Fourth Amendment prohibited law enforcement from testing the blood without a warrant. *C.f. United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (holding no Fourth Amendment violation only because the analysis done by law enforcement did not exceed the scope of the original frustration of privacy when a defendant's package was accidentally opened by a private mail carrier).

2. The record supplies an alternate ground to affirm the trial court: the grand jury subpoena used to obtain Appellee's blood was invalid.

If this Court were to reverse the court of appeals on the first ground, it should remand to the court to consider another argument for affirmance. The State presumes that the initial seizure of the blood sample from the hospital was valid. State's Br. at 11. Appellee argued to the trial court and briefed on appeal the argument that the grand jury subpoena was defective because it did not comply with state law. The court of appeals did not consider his question as it affirmed the trial court based on the illegality of the testing of the blood. If the grand jury subpoena were defective, then the motion to suppress should have been granted based upon article 38.23(a) of the Code of Criminal Procedure. *See Huse*, 491 S.W.3d at 843-44 (article 38.23's exclusionary rule may be applied to a violation of HIPAA if a grand jury subpoena *duces tecum* failed to comport with state law); *State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013) ("An appellate court should affirm a trial court's ruling so long as it is correct under any theory of law applicable to the case, even if the trial court did not rely on that theory.")

It was undisputed at trial that the documents used to seize the blood samples did not comply with article 24 of the Code of Criminal Procedure which governs the procedural requirements for grand jury subpoenas. 4 RR 100, 102.

- They were not issued by a court or a clerk. TEX. CODE CRIM. PROC. art. 24.01(d).

- They did not have a date of issuance. *Id*. art. 24.01(d).
- They were not issued upon the filing of an application by the district attorney or grant jury foreperson. *Id*. art. 24.03; 24.15; 20.11.

In addition to these defects, the record clearly establishes that the purported grand jury subpoena was not issued for a legitimate grand jury investigative purpose but to secure evidence for the State to use at trial. *See Huse*, 491 S.W. 3d at 846.

- The grand jury subpoena sought production of blood samples, even though the grand jury had no mechanism to test the samples. RR 61.
- The grand jury subpoena asked the custodian of records to appear with the blood samples a full month after the subpoena issued. State's Exh. 1
- The grand jury subpoena was signed by a prosecutor who had no knowledge of or involvement with the investigation. RR 38.
- The grand jury was not in session at the time the subpoena was issued. RR 45-46, 62.

The record is clear: what purported to be a grand jury subpoena did not comport with what the law requires for a subpoena and it was not issued to further "the grand jury's investigation" or even an investigation of a prosecutor which was intended to be turned over to a grand jury. Rather, the purpose of this document was to seize Appellee's blood from the hospital without law enforcement having to show probable cause.

The State's answer to this argument is constitutionally defective: "It happens all over the state all the time . . . ." RR 112-13. The warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). A grand jury subpoena has legitimate purpose, but a law enforcement tool to circumvent the warrant requirement is not one of them.

PRAYER

Wherefore, premises considered, Appellee prays that this court affirm the judgment of the court of appeals, or remand to consider Appellee's alternate argument for affirmance.

Respectfully submitted

Texas RioGrande Legal Aid, Inc.
Bee County Regional Public Defender
331 B North Washington St.
Beeville, TX 78102
361.880.5440 (tel)
361.358.5158 (fax)

By: **/s/ Patrick Overman**
Patrick Overman
State Bar No. 24095425
poverman@trla.org
Julie Balovich
State Bar No. 24036182
jbalovich@trla.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief was served on counsel for the State, Edward Shaughnessy III, by electronic file manager on this 18th day of April, 2018.

/s/ Patrick Overman
Patrick Overman

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Texas Rule of Appellate Procedure 9.4. The computer-generated word count for this document is under 3700 words based upon the word count of Microsoft Word and including all words and parts of this document required by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Patrick Overman
Patrick Overman